BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2019-185-E and 2019-186-E

South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Duke Energy Carolina's and Duke Energy Progress's Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	)	Docket Nos. 2019-185-E and 2019-186-E

SURREBUTTAL TESTIMONY OF STEVEN J. LEVITAS

ON BEHALF OF

THE SOUTH CAROLINA SOLAR BUSINESS ALLIANCE

OCTOBER 11, 2019

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Steven J. Levitas. My business address is 130 Roberts Street, Asheville, North Carolina 28801.

Q. WHAT IS YOUR OCCUPATION?

A. I am the Senior Vice President for Strategic Initiatives for Pine Gate Renewables, LLC.

Q. DID YOU PREVIOUSLY FILE DIRECT TETSIMONY IN THIS PROCEEDING?

A. Yes I did.

Q. WHAT IS THE PURPOSE OF YOUR SUR-REBUTTAL TESTIMONY IN THIS PROCEEDING?

A. The purpose of my sur-rebuttal testimony is to respond to certain elements of the Rebuttal Testimony of David B. Johnson and Steven B. Wheeler filed on behalf of Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP")(collectively "Duke").

I. <u>LARGE QF PPAs</u>

Q. WHAT IS YOUR OVERALL RESPONSE TO WITNESS JOHNSON'S TESTIMONY?

A. SCSBA and I appreciate that Duke has accepted or otherwise addressed many of the recommendations made in my testimony regarding the DEC/DEP proposed Large QF PPA. Duke's modifications to the proposed large QF PPA satisfactorily resolve most of the issues that I previously raised. In addition, in light of those concessions on Duke's part, SCSBA is willing to abandon certain other changes to the form PPAs that we previously requested. Thus, the only unresolved issues are those I identify and discuss below.

Q. WHAT IS YOUR RESPONSE TO DUKE'S PROPOSED ALTERNATIVE METHODOLOGY FOR CALACULATING DEFAULT LQUIDATED DAMAGES

AS SET FORTH IN WITNESS JOHNSON'S REBUTTAL TESTIMONY AT PAGES 7-10?

A. SCSBA appreciates Duke's attempt to develop a more reasonable formula for calculating liquidated damages ("LDs") in the event of a QF failure to achieve timely COD. However, it is not obvious that the new formula produces lower LDs than Duke's original formula (2% of expected revenues over the life of the project). In the interest of reaching consensus and in light of other concessions made by Duke, SCSBA is willing to accept whichever formula produces lower LDs.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S DISCUSSION AT PAGES 13-14 OF HIS REBUTTAL TESTIMONY OF YOUR PROPOSAL TO INCLUDE A MAXIMUM ANNUAL ENERGY PRODUCTION VALUE IN THE LARGE QF PPA?

A. Witness Johnson is correct that I believe that a maximum annual energy production value serves the same purpose as Duke's requirements that the Facility's DC capacity be specified and not modified without the utility's approval. I am not aware of any reason that the utility would care about DC capacity other than to ensure that the Facility not deliver more energy than the utility expected. Seeking to accomplish that goal by fixing DC capacity limits QF flexibility without providing any benefit to the utility or its ratepayers not provided by a maximum annual energy production value. I would also note that Duke and DESC have entered into a large number of PPAs in the Carolinas that do not contain a DC capacity limitation. That said, as discussed below in my response to Witness Wheeler's rebuttal testimony, SCSBA is generally prepared to accept Duke's position on these issues as part of a comprehensive resolution of the matters I address herein.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S OBJECTION, AT PAGE 17 AND PAGES 41-42 OF HIS REBUTTAL TESTIMONY, TO YOUR PROPOSAL THAT A QF BE ALLOWED TO TERMINATE A PPA OR LEO WITHOUT PENALTY WHERE ITS INTERCONNECTION COSTS EXCEEED $75,000 PER MEGAWATT?

A. While Witness Johnson is correct that such a condition precedent is not needed if the System Impact Study has been completed and a Facilities Study Agreement has been executed by the QF, it would be needed where the utility fails to complete the System Impact Study in a timely fashion and, as I have proposed, the QF is allowed to form a LEO or enter into a PPA. Indeed, in this scenario the QF should not be subjected to the dilemma of either not being able to secure pricing or doing so only by subjecting itself to substantial liquidated damages in the event it cannot go forward with the project because of excessive interconnection costs.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S ARGUMENT THAT SUCH A PROVISION IS INCONSISTENT WITH THE NOTION OF A QF HAVING COMMITED TO SELL ITS OUTPUT TO THE UTILITY?

A. Many binding contractual relationships include conditions precedent that allow a party to terminate the contract under limited circumstances. For example, the Duke PPAs are terminable if not approved by the Commission. That does not mean that the parties' commitment to one another is not otherwise binding. In addition, I would note that DESC has agreed to such a PPA provision in Docket No. 2019-184-E, *see* Rebuttal Testimony of Daniel F. Kassis at 34, and, as noted in my direct testimony similar provisions have been agreed to by Consumers Energy in Michigan.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S ARGUMENT THAT MANY QFS MAY FACE INTERCONNECTION COSTS IN EXCESS OF $75,000 PER MEGAWATT?

A. Witness Johnson may be correct, but the utilities have the ability to take my proposed condition precedent out of play by completing the System Impact Study within a year, which is much longer than the time provided for in the Commission's interconnection procedures.

Q. DO YOU HAVE ANY ADDITIONAL COMMENTS ON DEC AND DEP'S PROPOSED LARGE QF PPA?

A. I neglected to point out in my direct testimony that Duke does not allow the use of surety bonds as a permissible form of performance assurance. In contract, DESC's proposed PPAs do allow for the use of surety bonds and include a commercially reasonable form bond for this purpose. I would recommend Duke doing so as well.

II. <u>NOTICE OF COMMITMENT TO SELL FORM</u>

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S DISCUSSION AT PAGES 18-20 OF HIS REBUTTAL TESTIMONY OF THE FEDERAL ENERGY REGULATORY COMMISSION'S NOTICE OF PROPOSED RULEMAKING REGARDING PURPA AS IT RELATES TO DUKE'S PROPOSED NOTICE OF COMMITMENT TO SELL FORM?

A. As an initial matter, the Notice of Proposed Rulemaking ("NOPR") is just that – a proposal that is a long way from representing the final decision by the Federal Energy Regulatory Commission ("FERC") on possible changes to PURPA implementation. On that basis alone, it should be given no weight in this proceeding. Moreover, based on my more than

thirty years of experience as a regulatory lawyer, I have substantial concerns about the legality of the proposed rule and the factual support behind it. It will be vigorously opposed by many interested parties and if adopted in its current form will likely be subject to legal challenge. In short, it is anyone's guess whether the NOPR will ever become a proposed rule, and if so in what form. In the meantime it has no legal significance, nor does it constitute "guidance" from FERC on any issue.

Q. DO YOU AGREE WITH FERC'S PROPOSAL THAT QFS SHOULD BE REQUIRED TO DEMONSTRATE PROJECT VIABILITY AND FINANCIAL COMMITMENT BEFORE BEING ABLE TO FORM A LEO?

A. Let me first explain that under PURPA the concept of a legally enforceable obligation or "LEO" involves a QF obligating the utility to purchase the QF's output at a defined price and on defined terms (including contract length) by obligating itself to sell that output to the utility at that price and on those terms. Obviously, the best way to accomplish this is for the parties to mutually execute a contract. However, because of a concern about the potential for utilities to frustrate or delay QF contract formation, PURPA allows the QF, in the absence of a fully executed contract, to bind the utility by committing itself to sell its output to the utility. In my opinion this is best accomplished by the QF tendering a signed PPA to the utility. Where a form contract and applicable pricing have been approved by the state commission, that is an easy matter. In the absence of such conditions, the QF must make its commitment based on pricing and terms that it believes are reasonable and appropriate, and if those are disputed by the utility, the state commission must resolve the dispute. The Notice of Commitment to Sell form required by Act 62 is a relatively novel concept that to my knowledge has only been adopted elsewhere in North Carolina. In my

opinion, it is only needed where there is some reason that a QF can not tender a signed PPA to the utility.

Against that backdrop, the question to be considered is what conditions must a QF have met in order to be able to form a LEO, whether by executing a contract or in some other manner. In general, QFs would like to form LEOs as early in the development process as possible in order to have price certainty, while utilities seek to delay LEO formation until as close to a QF's in-service date as possible in order for contract pricing to be as up-to-date as possible. The state Commission's job, including under the approach proposed by FERC in the NOPR, is to strike a reasonable balance between these competing interests.

SCSBA agrees that there are certain steps in the development process that a QF must have taken in order to be able secure PPA pricing, which might be thought of as project viability requirements. These include that the QF must be FERC-certified (or self-certified), must have secured site control, and must have identified a point of interconnection to the utility's grid and filed an interconnection request. With respect to other requirements of the sort discussed by FERC in the NOPR or that have been adopted by other states, or proposed by Duke in this proceeding, the question is whether it is commercially reasonable to require that such pre-conditions be met before the QF has secured its PPA pricing.

For example, the reasonableness of FERC's proposal to require a "financial commitment" to development and construction of the QF as a pre-condition of LEO formation depends entirely on the meaning of that concept, which FERC doesn't explain. If it means that fully executed financing documents must be in place, that would be an absurd requirement. It is not possible for a QF developer to enter into such documents without secured pricing, and the process of doing so costs hundreds of thousands of dollars that no party would

incur without certainty as to project economics. If on the other hand it means that a QF should be required to generally demonstrate its ability to finance the project, that might not be an unreasonable requirement, provided that it recognizes that much QF development is done by small early stage developers whose projects are financed after sale to, or in partnership with, a third party.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S DISCUSSION AT PAGES 23-29 OF HIS REBUTTAL TESTIMONY OF DUKE'S REQUIREMENT THAT TO FORM A LEO A FACILITY MUST BE CAPABLE OF BEING PLACED IN SERVICE WITHIN 365 DAYS OF DELIVERING THE NOTICE OF COMMITMENT FORM AND YOUR OBJECTION TO THAT REQUIREMENT IN YOUR DIRECT TESTIMONY?

A. SCSBA is prepared to withdraw its objection to that requirement if the deadline is extended to account for additional time required for the utility to complete required Interconnection Facilities and Network Upgrades. Given the substantial delays that can occur at any time in the interconnection process (up to and including completion of work under an Interconnection Agreement), which are outside the control of the QF, there is almost no point at which a QF can be certain that it will be able to achieve commercial operation within 365 days, unless allowances are made for possible interconnection delays. I would note that the DESC Notice of Commitment form contains such a provision. I would also note that, as Witness Johnson points out, this relief from an in-service deadline based on interconnection timing has been incorporated by Duke into its Large QF PPAs. Just as there is no reason that a QF should be prevented from executing a PPA because of the

utility's interconnection schedule, it similarly should be prevented from forming a non-contractual LEO for that reason.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S STATEMENT AT PAGE 26 OF HIS REBUTTAL TESTIMONY THAT "NEITHER PURPA NOR ACT 62 REQUIRES THE COMMISSION TO ENSURE THAT QFS CAN SECURE PRICING FROM THE UTILITY BY A CERTAIN POINT IN THE DEVELOPMENT PROCESS"?

A. While neither PURPA nor Act 62 specifically addresses this issue, both require state commissions to adopt rules and policies that encourage QF development in balance with protecting ratepayer interests. This goal cannot possibly be accomplished without providing QFs with price certainty at a reasonable point in the development process. Duke and other utilities require such certainty with respect to cost recovery in their own development process, as do their non-regulated businesses.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S DISCUSSION AT PAGES 27-29 OF OTHER STATES' LEO TESTS?

A. With one exception not controlling here, to my knowledge these LEO tests have not been approved by the federal courts. More importantly, my belief is that there has been little or no QF development in states that have adopted onerous LEO formation tests.

Q. WHAT IS YOUR RESPONSE WITNESS JOHNSON'S DISCUSSION, AT PAGES 29-33 OF HIS REBUTTAL TESTIMONY, OF YOUR PROPOSED CONDITION FOR LEO FORMATION BASED ON THE PASSAGE OF TIME SINCE THE QF'S INTERCONNECTION REQUEST AND TO DUKE'S PROPOSAL TO REQUIRE THAT A QF MUST HAVE SIGNED A FACILITIES STUDY AGREEMENT

("FSA") AS A CONDITION OF BEING ABLE TO FORM A LEGALLY ENFORCESABLE OBLIGATION?

A. I agree that there are some benefits to such a requirement. Specifically, as Witness Johnson observes, deferring LEO/contract formation until the FSA has been signed provides both the developer and the utility with a better sense of project viability and moves the establishment of the contract price to a point closer to commercial operation. However, Witness Johnson fails to recognize the purpose served by my proposal that, in the alternative, the QF be able to form a LEO or execute a PPA within one year of filing its interconnection request if the utility has not completed the System Impact Study (or using Duke's proposal, if it has not yet been presented with a Facilities Study Agreement to execute). In the absence of such an alternative, the utility could potentially control and frustrate the QF's LEO formation, which has been expressly prohibited by FERC and reaffirmed in the NOPR. As I pointed out in my direct testimony, the North Carolina Utilities Commission, with Duke's consent, has adopted exactly this sort of approach. In sum, I am comfortable with Duke's proposed requirement that a signed FSA be a condition of LEO formation or PPA execution, provided that there is an alternative eligibility criterion based on time from the interconnection request. I continue to believe that one year is a reasonable interval given the time frames set forth under the Interconnection Procedures, but if Duke believes the one-year time frame I proposed is unreasonable in some circumstances, SCSBA would be willing to discuss alternatives.

Q. WHAT IS YOUR RESPONSE TO WITNESS JOHNSON'S DISCUSSION AT PAGES 33-34 OF HIS REBUTTAL TESTIMONY TO YOUR OBJECTION TO

REQURING THAT ALL ENVIRONMENTAL PERMITS AND LAND -USE APPROVALS BE OBTAINED AS CONDITION OF LEO FORMATION?

A. As I have discussed, the fundamental question is what steps should a QF reasonably be required to take before being able to obtain fixed long-term pricing. I explained in my direct testimony why it is not reasonable to require QFs to obtain all environmental permits and land use approvals without having firm pricing. In addition, Duke has never made such requirements a pre-condition of executing a PPA and does not propose to do so in this proceeding.

Q. DO YOU CONTINUE TO BELIEVE THAT A QF SHOULD BE ABLE TO TERMINATE ITS NOTICE OF COMMITMENT BASED ON INTERCONNECTION COSTS?

A. Yes, though as discussed above, given the pre-condition related to the interconnection process, in many cases those costs will be known by the time the form is executed.

III. ENERGY STORAGE PROTOCOL AND STANDARD OFFER PPA AND TERMS AND CONDITIONS

Q. WHAT IS YOUR RESPONSE TO WITNESS WHEELER'S DISCUSSION ON PAGES 8-9 OF YOUR RECOMMENDATIONS REGARDING THE ENERGY STORAGE PROTOCOL?

A. Mr. Wheeler has adopted most of my recommendations regarding Duke's proposed Energy Storage Protocol. With respect to my recommendation that the Standard Offer PPA and Terms and Conditions specify that the Energy Storage Protocol must be Commission-approved, Mr. Wheeler's proposed language in revised Section 2(b) of the Terms and Conditions addresses my concern.

Q. WHAT IS YOUR RESPONSE TO WITNESS WHEELER'S DISCUSSION AT PAGES 10-11 OF HIS REBUTTAL TESTIMONY TO YOUR PROPOSED MODIFICATION OF THE DEC AND DEP STANDARD OFFER PPA TO REMOVE THE OUTSIDE IN-SERVICE DATE?

A. SCSBA does not object to the inclusion of an outside-in-service date provided it is linked to the Interconnection Facilities and Network Upgrades In-service Date, as Duke has agreed to with respect to its Large QF PPAs.

Q. WHAT IS YOUR RESPONSE TO WITNESS WHEELER'S DISCUSSION AT PAGES 11-22 OF HIS REBUTTAL TESTIMONY RELATING TO YOUR OBJECTION TO DUKE'S "MATERIAL ALTERATION" DEFINITION AND RELATED TERMS AND CONDITIONS.

A. In the interest of further narrowing the matters in dispute in this proceeding, and as part of a comprehensive resolution of issues relating to the PPAs and the NOC form, SCSBA is willing to accept Duke's position on these issues subject to two modifications. First, Duke's the Terms and Conditions need to provide that Duke's consent to requested material alterations will not be unreasonably withheld, conditioned or delayed. Duke has agreed to a similar condition in its Large QF PPAs. Second, the proposed terms and conditions must be applied only prospectively to new PPAs and not be made applicable to existing PPAs. (It is not clear whether Duke is asking the Commission to modify existing PPAs to incorporate its proposed new terms and conditions, but doing so would be highly problematic for existing QFs and their financing parties and of questionable legality.) Those contractual relationships must continue to be governed by the PPAs and terms and conditions that are currently in place. However, Duke would not be precluded from taking

a position as to what the current language of those existing PPAs provides or how it should be interpreted.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.